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No. 74-1479

In the Supreme Court of the United States

OCTOBER TERM, 1975

ISAAC LEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends (1) that the government improperly impeached a defense witness; (2) that the prosecutor's comment during closing argument, in regard to the failure of petitioner's wife to testify, was improper; (3) that the trial judge improperly instructed the jury on the issue of reasonable doubt; (4) that a government exhibit was improperly admitted into evidence; (5) that the jury's verdict was inconsistent; and (6) that the indictment was defective.

Following a jury trial in the United States District Court for the District of South Carolina, petitioner was convicted of conspiring to distribute heroin, in violation of 21 U.S.C. 846 (Pet. App. 27).[1] Petitioner was sentenced to 10 years' imprisonment. The court of appeals affirmed without opinion (Pet. App. 28-29).

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[1]Petitioner was acquitted by the jury on a charge of distributing heroin, in violation of 21 U.S.C. 841(a)(1).

On January 23, 1972, a government informant and Agent Ellis Dean of the Bureau of Narcotics and Dangerous Drugs met with Raymond Gore in Atlantic Beach, South Carolina. Gore agreed to sell one ounce of uncut heroin to Dean but stated that he would need to contact his "man," referred to as "Ike" or "New York Ike," in order to obtain it (Tr. 131-132). Petitioner was known as "Ike" to Gore and others (Tr. 424, 492). The next morning Gore placed a telephone call to petitioner's home in New York (Tr. 56, 155) and made arrangements for the heroin to be delivered in Atlantic Beach on January 25, 1972 (Tr. 59-62, 245).

Petitioner arrived in Atlantic Beach on the morning of the delivery date and went to Artis Vaught's apartment, where he hid a packet of white powder (Tr. 314). Petitioner subsequently met with Gore, Dean, and the informant and told them that the "stuff" was at Vaught's apartment (Tr. 249). That evening at Vaught's apartment, Gore delivered about one-half ounce of heroin to Agent Dean in exchange for $1,500 (Tr. 85-87). Petitioner was not present during the sale but walked in immediately afterward and asked Dean if the "stuff was good" and if he needed material to cut the heroin (Tr. 88). Petitioner also stated that if Dean and the informant wanted more heroin, they would have to come to New York and purchase a greater quantity (Tr. 89-90, 258). Gore attempted at that point to give the $1,500 to petitioner, but petitioner refused to accept the money while Agent Dean was in Vaught's apartment (Tr. 258). Petitioner instead waited until the next morning to receive the proceeds of the sale (Tr. 521).

Petitioner testified and denied any involvement in the heroin sale (Tr. 511). Gore testified for the defense; he also denied that petitioner was involved. The government presented evidence on rebuttal that Gore may have feared reprisal by petitioner (Tr. 551).

1. Petitioner argues (Pet. 10-14) that the government improperly impeached Gore's testimony by presenting evidence that Gore had admitted he was afraid to testify against petitioner because of "what might happen here or later" (Tr. 551). Although Gore denied making the statement (Tr. 488), Charles Porter, Artis Vaught's attorney, testified that Gore had made that statement in his presence (Tr. 551). Petitioner argues that Porter's testimony was inadmissible because it reflected adversely on petitioner's character and reputation and, alternatively, because it violated a confidential attorney-client relationship between Porter and Gore.

The evidence was presented to demonstrate Gore's motive for testifying, not for the purpose of attacking petitioner's character. Evidence of a witness's fear of reprisal is admissible to impeach his testimony regardless of any indirect effect it may have on the jury's assessment of the character of the accused. *United States* v. *Cerone*, 452 F.2d 274 (C.A. 7), certiorari denied, 405 U.S. 964; *United States* v. *DeLutro*, 435 F.2d 255, 256-257 (C.A. 2), certiorari denied, 402 U.S. 983.

There was, moreover, no breach of a confidential relationship by Porter in revealing Gore's fear of petitioner. Although he had been Gore's attorney in the past, Porter did not represent Gore at the time the statement was made, and Gore had been advised of that fact (Tr. 463-467). In any event, the privilege of excluding from evidence a client's confidential communications to his attorney is a personal privilege of the client; it cannot be asserted by a third party, such as petitioner. See, e.g., McCormick, *Evidence*, §92 (2d ed. 1972).

2. Petitioner also contends (Pet. 14-16) that the prosecutor improperly commented during closing argument on the failure of petitioner's wife to testify (Tr. 586-587). Even assuming that an accused's failure to call his spouse is not a proper subject of comment by government counsel, petitioner did not object to the prosecutor's remark in this case.

Moreover, the district court instructed the jury that "the law never imposes upon the defendant in a criminal case the burden or the duty of calling any witnesses or producing any evidence" (Tr. Ch. 3, 11). That instruction was sufficient, in view of petitioner's failure to object or request additional instructions, to cure any prejudice that may have been created by government counsel's remark. See *United States* v. *Kirk*, 496 F.2d 947, 951 (C.A. 8).

3. Petitioner argues (Pet. 17) that, by refusing to instruct the jury that a reasonable doubt could be created not only by the evidence presented but also by a lack of evidence, the district court erroneously precluded the jury from considering a lack of evidence in resolving the issue of reasonable doubt.

The substance of the instruction requested by petitioner, however, was implicit in the instructions given by the court, which placed the burden on the government to prove its case beyond a reasonable doubt. Since the instructions already given fully informed the jury of the basic concept of reasonable doubt (Tr. Ch. 10-11), it was not error for the court to refuse to use the specific language requested by petitioner. See *United States* v. *Caruso*, 358 F.2d 184, 186-187 (C.A. 2), certiorari denied, 385 U.S. 862.

4. Petitioner contends (Pet. 18-19) that the evidence was insufficient to support his conviction, because the government failed to establish that the heroin admitted into evidence at trial (Gov't Ex. 2) was the substance sold by Gore to Agent Dean.

Agent Dean gave the packet containing the white powder he received from Gore to Agent Shumard of the Drug Enforcement Administration (Tr. 94). Agent Shumard testified that, after placing the packet securely in a "lock-seal" envelope (Gov't Ex. 1), which could not be opened without being torn or destroyed, he mailed the packet to the Washington Regional Laboratory (Tr. 176-182). The envelope was received at the laboratory and assigned to a chemist

(Tr. 191-192). The chemist testified that the envelope had not been tampered with and was sealed and intact when he received it (Tr. 206-207). The chemist further testified that he opened the envelope himself, determined that the packet inside contained heroin, and placed the evidence in another sealed envelope (Gov't Ex. 3), where it remained until the time of trial (Tr. 208-210).

Petitioner asserts that, because the government did not establish the identity of the laboratory employee who transferred the sealed envelope containing the packet to the chemist, there was a break in the chain of custody requiring exclusion of the evidence. The "lock-seal" envelope in which Agent Shumard placed the evidence, however, was received intact by the chemist. Since the evidence could not have been tampered with without tearing or destroying the envelope, the government established that the condition of the evidence had not been altered from the time of the sale. The evidence therefore was properly admitted. See *United States* v. *Brown*, 482 F.2d 1226 (C.A. 8).

5. Petitioner next contends (Pet. 20-21) that inconsistent verdicts by the jury deprived him of due process. Petitioner was acquitted by the jury on the substantive charge of distributing heroin but was convicted of conspiring with Gore and others to commit that offense. Since the two charges required proof of different elements, however, the verdicts were not inconsistent.

In any event, due process is not violated by inconsistent verdicts. See *Dunn* v. *United States*, 284 U.S. 390. In view of this Court's recent reaffirmation of that principle in *Hamling* v. *United States*, 418 U.S. 87, 101, there is no merit to petitioner's suggestion that the holding in *Dunn* is "outdated" and should be reexamined.

6. Petitioner's final contention (Pet. 22-24) is that the conspiracy count of the indictment was defective because it duplicated the charges in the substantive count and because it charged both a conspiracy and a substantive crime in a single count.

The first count of the indictment[2] charged petitioner with conspiring to distribute heroin in violation of 21 U.S.C. 846; it did not charge any other crime. Petitioner's argument is that the wording of the last few lines of the first paragraph of the indictment, which allege that petitioner conspired to distribute heroin "in violation of Title 21, United States Code, Section 841(a)(1) and 846," charged him with both the conspiracy and the substantive violation in the same count of the indictment. That portion of the indictment, however, merely specified the substantive crime that was the object of the conspiracy. Petitioner was in fact charged with the substantive violation of 21 U.S.C. 841(a)(1) in the second count. Moreover, the last line of the conspiracy count of the indictment plainly alleged that the overt acts were "[a]ll in violation of Title 21, United States Code, Section 846," the conspiracy provision.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.

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[2]The text of the indictment is reproduced at Pet. App. 26-27, but the last line of the first count is omitted. The line following the listing of overt acts in the first count states, "[a]ll in violation of Title 21, United States Code, Section 846."